BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RODNEY WARD	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,002,085
GARY POWELL, d/b/a ALLIANCE CONSTRUCTION COMPANY	)	
Respondent	)	
AND	)	
	)	
UNINSURED	)	
Insurance Carrier	)	
AND	)	
	)	
KANSAS WORKERS COMPENSATION FUND	)	

ORDER

Respondent appeals the preliminary hearing Order of Administrative Law Judge Bryce D. Benedict dated April 22, 2002, wherein claimant was awarded benefits after the Administrative Law Judge found claimant to be an employee of respondent, rather than an independent contractor.

ISSUES

This is a claim for a January 12, 2002 accident. The Administrative Law Judge found that claimant worked for respondent as an employee. Respondent contends that claimant was hired as an independent contractor and respondent should not be liable for any workers' compensation benefits. That is the only issue before the Appeals Board (Board) on this appeal.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and for preliminary hearing purposes, the Board finds that the Order of the Administrative Law Judge should be affirmed.

Claimant began working for respondent in March of 2001. At that time, respondent was working both as a roofing contractor and installing security alarms in residences. Claimant was untrained in both areas, but respondent provided training to claimant.

The roofing jobs became the more predominant and more successful business. After a period of several months through June of 2001, the security alarm system business closed, and respondent concentrated solely on roofing residential houses.

Respondent would bid the contracts and, if the bid was awarded, would utilize claimant and other workers to complete the tearing off and reapplying of the roofing materials. Claimant was paid by the job, rather than by the hour. Respondent provided the large equipment, with claimant being responsible for providing only his tool belt and his hammer. Any other equipment would be provided by respondent. Claimant was paid by the square after respondent inspected the work and found it satisfactory. If the work performed was not up to code or customer expectations, then claimant and the other workers would be required to remove the material and reapply it in a satisfactory manner.

Respondent's owner, Gary Powell, testified he could not fire claimant, but acknowledged that if the work performed or the working relationship was not acceptable, then he simply would not use claimant in other contractual situations. Respondent did agree that if a problem developed on a job, it was within his power to ask claimant or any other workers to leave the job. It would then be completed by someone else.

Claimant was paid in a lump sum by the job and no taxes were deducted by respondent. Respondent stated that if claimant needed additional help, claimant was able to hire additional workers. Claimant testified that he could hire additional workers, but the ultimate decision on whether they would be allowed to stay was up to respondent. Additionally, the ultimate decision regarding the quality of the work was up to respondent as well. Respondent was the only person who paid the workers. Even if claimant brought someone else on to the job, claimant would not be responsible for paying that person. The amount of money paid to each employee was ultimately the responsibility of respondent.

On January 12, 2002, while working on a three-story house, claimant fell off the roof, suffering significant injury to his left leg and hip. Claimant fractured the leg and dislocated the hip, requiring that it be reset at the emergency room. No additional surgery was required, but additional ongoing medical care was necessitated by the injury. Neither claimant nor respondent had any insurance at that time. There had been discussion between the two about the possibility of respondent providing health insurance for the workers, but respondent apparently never got around to it.

Claimant acknowledged he had no insurance and was unable to pay the medical bills stemming from this injury. Respondent, on May 1, 2002, impleaded the Kansas

Workers Compensation Fund after determining that respondent would be unable to pay for the temporary total disability and medical expenses associated with this injury.

The business is owned by respondent Gary Powell, but is not a corporation. The business has no employees. Mr. Powell testified that all persons working for the respondent business were considered to be independent contractors. However, prior to claimant's injury, there were no signed documents to verify the independent nature of the employment relationship. After claimant fell off the roof, respondent began requiring all employees to sign an agreement specifying that they were independent contractors.

Respondent placed into evidence, as Respondent's Exhibit 3, a lien release signed by claimant. This lien release was required by a particular homeowner who knew that the workers on his house were independent contractors, rather than employees of respondent. The homeowner required each worker at the residence to sign a separate lien release. Respondent argued that this was an indication that claimant was an independent contractor, separate from respondent. Claimant, however, testified that he was not familiar with lien requirements and did not understand the significance of the document other than the fact that he was told by respondent to sign it.

The Workers Compensation Act is to be liberally construed to bring employers and employees within its provisions and protections. K.S.A. 44-501(g).

> Workers compensation statutes are to be liberally construed to effect legislative intent and award compensation to a worker where it is reasonably possible to do so. Kinder v. Murray & Sons Constr. Co., 264 Kan. 484, 957 P.2d 488 (1998).

It is often difficult in many situations to determine whether a person is an employee or an independent contractor. Many elements are involved in determining which relationship may actually exist. There is no absolute rule for determining whether an individual is an independent contractor or an employee. Wallis v. Secretary of Kans. Dept. of Human Resources, 236 Kan. 97, 689 P.2d 787 (1984).

The relationship of the parties depends upon all the facts in the case. What label they use in describing each other is only one of those facts to be considered. The terminology used by various parties is not binding when determining whether an individual is an employee or an independent contractor. Knoble v. National Carriers, Inc., 212 Kan. 331, 510 P.2d 1274 (1973).

> The primary test used by the courts in determining whether the employer-employee relationship exists is whether the employer has the right of control and supervision over the work of the alleged employee, and the right to direct the manner in which the work is to be performed, as well as the

> result which is to be accomplished. It is not the actual interference or exercise of the control by the employer, but the existence of the right or authority to interfere or control, which renders one a servant rather than an independent contractor. Wallis, *supra*, at 102 and 103.

In addition to the right to control and the right to discharge the worker, other recognized tests of the independent contractor relationship are:

> (1) The existence of a contract to perform a certain piece of work at a fixed price;
>
> (2) The independent nature of the worker's business or distinct calling;
>
> (3) The employment of assistants and the right to supervise their activities;
>
> (4) The worker's obligation to furnish tools, supplies and materials;
>
> (5) The worker's right to control the progress of the work;
>
> (6) The length of time that the worker is employed;
>
> (7) Whether the work is paid by time or by the job; and
>
> (8) Whether the work is part of the regular business of the employer.
>
> McCubbin v. Walker, 256 Kan. 276, 886 P.2d 790 (1994).

In this particular instance, the Board finds respondent had the right to control the work performed by claimant and the other workers. Additionally, if the relationship did not work, respondent had the right to refuse to continue employing claimant or any of the other workers. Even though respondent testified that he could not fire the workers and he simply would not use them later, the end result was the same. While claimant had the right to employ certain assistants, claimant did not supervise their activities and was not responsible for paying their wages. The only tools claimant furnished in this instance were a tool belt and a hammer. All other materials and tools were provided by respondent. The determination of the qualify of the work fell squarely on respondent, with respondent having the right to require the workers to redo the work if it was not performed up to code or customer expectations. The Board acknowledges claimant was compensated as an independent contractor being paid by the square rather than wages, but this is only one element to be considered in this instance. Finally, the work performed was the regular business of the employer.

The Board concludes for the above reasons that claimant should be considered an employee for the purposes of the Workers Compensation Act, rather than an independent contractor. Therefore, the Order of the Administrative Law Judge awarding claimant benefits should be affirmed.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Bryce D. Benedict dated April 22, 2002, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of June 2002.

BOARD MEMBER

c: George H. Pearson, III, Attorney for Claimant
Jeff K. Cooper, Attorney for Respondent
Jerry R. Shelor, Attorney for the Fund
Bryce D. Benedict, Administrative Law Judge
Philip S. Harness, Director